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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 324

TIME, INCORPORATED, *Petitioner,*

v.

FRANK PAPE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD ELLIS
DON H. REUBEN
of
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
130 East Randolph Drive
Chicago 1, Illinois
Attorneys for Petitioner,
Time, Incorporated

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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5 1961 Report of the U. S. Commission on Civil Rights, *Justice* 2, 4, 5

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OPINION BELOW

The opinion of the Court of Appeals (R. 61-68), printed in Appendix A hereto, is reported in —— F.2d ——.

JURISDICTION

The judgment of the Court of Appeals (R. 69) was entered on April 25, 1963 (Appendix B hereto). A Petition for Rehearing and/or Clarification was denied by the Court of Appeals on June 14, 1963 (R. 75; Appendix C hereto). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

This petition does not seek the usual relief; the Court is not asked to grant plenary review on the merits of the proceedings below. Instead, petitioner is simply and solely requesting that the Court grant certiorari and remand the case to the Seventh Circuit for vitally needed clarification of an ambiguous judicial ruling that may in fact have been a critical determination of First Amendment rights.[1]

QUESTION PRESENTED

A news article in *Time* Magazine discussed and quoted a portion of the 1961 Report of the U. S. Commission on Civil Rights that summarized charges of misconduct made by a Negro family in a Civil Rights Act suit against respondent Pape, of the Chicago Police. Pape brought this libel suit against *Time* alleging that its article accused him of in fact violating the Negro family's civil rights while the Commission's Report had not done so; the District Court dismissed the action, and Pape appealed to the Seventh Circuit. While that appeal was pending, trial of the Civil Rights Act suit ended in a final adjudication of Pape's liability to the Negro family, and this final adjudication was promptly called to the Seventh Circuit's attention by a motion to dismiss Pape's appeal.

The Seventh Circuit reversed the dismissal of Pape's libel complaint and remanded "for further proceedings." In a single cryptic paragraph, the Seventh Circuit took "judicial notice" of the final adjudication of Pape's Civil Rights liability but denied the motion to dismiss the appeal without stating any reason. Even after specific request in a rehearing petition, the Seventh Circuit refused to

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[1] 28 U.S.C. §2106 provides: "The Supreme Court . . . may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."

indicate whether or not its rejection of the motion to dismiss was a ruling that the Civil Rights judgment was without admissibility or relevancy to establish *Time's* constitutionally secured defense of truth; the parties and the trial court are thus in a state of conjecture as to whether the Seventh Circuit intended to rule upon the merits concerning this evidence of truth or to relegate the question entirely to the trial court for initial determination.

The sole question presented is whether the fair and orderly administration of justice and the declared public policy in favor of expediting litigation require the Seventh Circuit to declare if it has ruled upon the admissibility or relevancy of the final judgment against Pape as that judgment relates to *Time's* First Amendment right to prove the truth; or instead, ruled that the trial court should first make such determination.

STATEMENT OF THE CASE

This case is an outgrowth of *Monroe* v. *Pape*, 365 U.S. 167 (1961). This Court there reversed a decision of the Seventh Circuit that held that a suit could not be maintained under the Civil Rights Act[2] against the respondent Pape, a Chicago Police Captain, and several of his subordinate officers, for violation of the federal constitutional rights of the Monroes. The Monroes, a Negro family residing in Chicago, averred that respondent Pape and his subordinates, acting without a warrant, had broken into the Monroe apartment at 5:45 a.m., routed the family from bed at gunpoint, ransacked the entire apartment, physically abused Mr. and Mrs. Monroe and the children, took Mr. Monroe to the police station and detained him there 10 hours for interrogation without permitting him to call his family or an attorney and without taking him before a magistrate, and finally released him without filing

[2] R.S. § 1979, 42 U.S.C. § 1983.

any charges. The Seventh Circuit sustained,[3] but this Court rejected,[4] the officers' defense that the conduct of which the Monroes complained was not redressable under the Civil Rights Act because it was outside the scope of their police authority and prohibited by state law.

After this Court's reversal, *Monroe* v. *Pape* proceeded to trial, and verdict and judgment resulted in favor of the Monroes. (R. 22-24.) No appeal was taken and the judgment became final on February 23, 1963. (Docket No. 59-C-329, D.C.N.D. Ill.)

Meanwhile, in the period between this Court's reversal and the trial of the Monroes' suit, the 1961 Report of the U. S. Commission on Civil Rights was issued.[5] Volume 5 of the Report, entitled *Justice*, contained a chapter on "Unlawful Police Violence" which narrated several episodes of reported police misconduct or brutality, including the events described in the complaint in *Monroe* v. *Pape*. (R. 62-64.) The chapter was prefaced with a statement that the Commission had not conclusively determined whether the reported allegations of police misconduct were correct, but that they were "supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations."[6]

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[3] 272 F. 2d 365, 366.

[4] 365 U.S. 167, 187.

[5] The Commission was created by the Civil Rights Act of 1957, 42 U.S.C. § 1975, to study civil rights problems and report to the President and Congress. As this Court noted in *Hannah* v. *Larche*, 363 U.S. 420, 441 (1960), the purpose of the Commission's existence "is to find facts which may subsequently be used as the basis for legislative or executive action."

[6] 5 1961 United States Commission on Civil Rights Report, p. 5. (R. 62.)

Respondent Pape brought this libel action against petitioner on the basis of a news article in *Time* Magazine which reported upon the above-described portion of the Commission's Report. (R. 61-63) At one point, the *Time* article quoted the Report's language describing the acts of Pape and his fellow officers against the Monroe family as related in the latter's complaint.[7] (R. 62-64.) Pape alleged that the *Time* article charged him with in fact violating the Monroes' civil rights.

Time's motion to dismiss the complaint on grounds of qualified privilege and fair comment was granted by the District Court, ——F. Supp. —— (N.D. Ill. 1963; R. 62-63), and Pape appealed to the Seventh Circuit.

While Pape's appeal was pending, trial on the merits of *Monroe* v. *Pape* was concluded, resulting in verdict and judgment holding Pape liable to the Monroes under the Civil Rights Act in the sum of $8,000. (R. 22-24.). No appeal was taken and after the judgment became final by lapse of time, petitioner promptly apprised the Court of Appeals of that final judgment by a motion to dismiss Pape's appeal for mootness. (R. 3-5.)

The Seventh Circuit, with one judge dissenting, construed Pape's libel complaint as stating an actionable claim, and reversed and remanded to the District Court "for further proceedings." (R. 61-69.) In one brusque paragraph at the end of its opinion, the Court of Appeals took "judicial notice" of the final judgment against Pape in the *Monroe* case and rejected out of hand *Time*'s suggestion that this judgment had rendered the libel case moot. That paragraph states:

> "This court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court,

[7] The Commission's Report had borrowed this quoted language from Mr. Justice Frankfurter's summary of the complaint in his dissenting opinion in *Monroe* v. *Pape*, 365 U.S. at 203. (R. 63.)

a verdict and judgment were recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied." (R. 66.)

In a Petition for Rehearing and/or Clarification (R. 70-74), petitioner requested that the Court of Appeals clarify that part of its opinion dealing with the final judgment in *Monroe* v. *Pape*. Petitioner pointed out that the *Monroe* judgment *was* final, and that on remand a controversy would undoubtedly occur over its admissibility, relevancy, and probative effect in establishing petitioner's constitutional defense of truth. Petitioner also urged that the Court of Appeals' cursory and cryptic paragraph judicially noticing and spurning the *Monroe* judgment would inevitably provoke a further controversy over whether the court intended to rule upon the admissibility, relevancy or probative effect of the judgment as it relates to the constitutional defense of truth, or whether it intended to leave those questions wholly to the initial determination of the trial court.

The Court of Appeals denied the petition without opinion, again by a 2-1 vote. (R. 75.)

REASONS FOR GRANTING THE WRIT

Petitioner seeks certiorari for the single and narrow purpose of requesting the Court to remand the case to the Court of Appeals with an instruction to clarify its judgment by specifically indicating whether it intended to rule upon the admissibility, relevancy, or probative effect of the final adjudication in *Monroe* v. *Pape*, or to relegate those questions entirely to the trial court for initial determination.

The relief sought may be unusual, but its urgency and appropriateness are distinctly apparent in the extraordinary circumstances here presented. The Court of Appeals

not only failed to furnish necessary guidance to the trial court on the inevitable and critical question of what effect should be accorded the *Monroe* judgment; but the court also, by its perfunctory notice of that judgment and unqualified rejection of *Time*'s mootness suggestion, spawned still a greater source of inevitable controversy and confusion in the trial court as to whether it thereby intended to reject or downgrade the admissibility or relevancy of the *Monroe* judgment. The Court of Appeals, by this bizarre obfuscation of its position on a vitally important matter that "is fundamental to the further conduct of the case,"[8] has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."[9]

Petitioner does not seek clarification out of academic curiosity; its concern is intensely practical. The court below has held that the *Time* article of which Pape complains may be construed as charging Pape with violating the Monroes' civil rights during an arrest; *Time* clearly has the right to prove that its article was true, and hence protected by freedom of speech and press under the First and Fourteenth Amendments. We can conceive of no better or more relevant evidence of the literal truth of the *Time* article than the final judgment entered in the *Monroe* suit, after full trial, finding that Pape in fact violated the Monroes' civil rights. If that final judgment cannot be construed as res judicata with respect to *Time*'s defense of truth, or at least held to be fully admissible and relevant evidence to prove the truth, *Time*'s defensive position will be seriously, perhaps fatally, impaired.

The importance of the relief sought transcends the private interests of the litigants. News coverage of current events in the civil rights area has recently met with a

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[8] *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945).

[9] Rule 19(1)(b), Revised Rules of this Court.

number of retaliatory libel actions brought by officials of state and local governments;[10] the procedures followed and sanctioned in the adjudication of these cases, especially with regard to proof of the facts, are of vital concern to the news media of this country and the public they serve. This Court has repeatedly stressed that because of the preferred position which freedom of speech and press enjoys in our constitutional order, any method by which that freedom is sought to be curtailed must be subjected to close analysis and critical judgment. *E.g., Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441-42 (1957); *Near* v. *Minnesota*, 283 U.S. 697 (1931). Moreover, since only considerations of the greatest urgency can justify restrictions on speech, the "procedures by which the facts of the case are adjudicated are of special importance. . . ." *Speiser* v. *Randall*, 357 U.S. 513, 521 (1958). The delicate task of separating protected from unprotected speech clearly "calls for more sensitive tools," *id.* at 525, than the Seventh Circuit has provided in this case.[11]

As matters now stand, the murky and negative treatment accorded the *Monroe* judgment by the Seventh Circuit

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[10] In addition to the instant case, for example, a number of civil libel actions have been brought against the *New York Times* in Alabama by state and local officials on the basis of articles or advertisements in the *Times* dealing with the Southern Negro civil rights movement. See *New York Times Co.* v. *Sullivan*, 144 So. 2d 25 (Ala. 1962), *cert. granted*, 371 U.S. 946 (1963), in which a judgment against the *Times* of $500,000 was affirmed by the Alabama Supreme Court. See also *Parks* v. *New York Times Co.*, 195 F. Supp. 919 (M.D. Ala. 1962), *rev'd*, 308 F. 2d 474 (5th Cir. 1962); *New York Times Co.* v. *Connor*, 291 F. 2d 492 (5th Cir. 1961), *rev'd*, 310 F. 2d 133 (5th Cir. 1962). Damages exceeding $3,000,000 have been claimed in these cases. Alabama officials have also brought several libel actions against the Columbia Broadcasting System based on television coverage of civil rights conflicts in the South. See cases cited in Petition for Certiorari, p. 19 (footnote), *New York Times Co.* v. *Sullivan*, *supra*.

[11] Cf. *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961).

casts grave doubt upon its admissibility and relevancy to prove *Time*'s constitutional defense of truth. This doubt is magnified by the court's mute rejection of *Time*'s rehearing request to make clear whether it meant to leave the admissibility and relevancy of the *Monroe* judgement entirely to the trial court's initial determination. If such was the court's intention, *one simple sentence to that effect would suffice*. If something else was meant, justice demands disclosure of that meaning now; the trial court and litigants should not be left to grope in darkness and risk the pitfalls and delay of piecemeal trial and review. Only the Court of Appeals can clarify what it meant to hold; only this Court, through exercise of its supervisory power, can require that the necessary clarification be made in the interest of fair procedure and expedient disposition of litigation.[12]

The simplicity of the issue and of the relief sought by petitioner makes full briefing and oral argument quite unnecessary. Cf. *State Tax Comm'n of Arizona* v. *Murray Co. of Texas*, 364 U.S. 289 (1960); *Chicago* v. *Willett Co.*, 341 U.S. 913 (1951); *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Summary remand of the case for clarification of a narrow but critically important phase of the Seventh Circuit's judgment and opinion would not require this Court to inquire into the merits of the holding below or to pass upon any matters ordinarily left to the circuits in diversity cases. On the other hand, such remand would assure essential guidance to the trial court on a question of First Amendment rights that is crucial to the further conduct of the case, would avoid the intolerable delay and injustice of piecemeal trial and review, and would consequently "prevent extraordinary in-

[12] See Kaufman, *The Philosophy of Effective Judicial Supervision over Litigation*, 29 F.R.D. 207 (1962); Olney, *An Analysis of Docket Congestion in the United States District Courts*, 29 F.R.D. 217 (1962); Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

convenience and embarrassment in the conduct of the cause." *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). Moreover, such remand would foster the salutary purpose of deterring repetitions of the practice which was followed below in all cases, particularly those involving "preferred position" rights under the First Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the case should then forthwith be remanded to the Seventh Circuit for clarification of that part of its opinion pertaining to the final judgment in *Monroe* v. *Pape*.

Respectfully submitted,

HOWARD ELLIS
DON H. REUBEN
of
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
Attorneys for Petitioner,
Time, Incorporated